

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals)	
with Hearing and Speech Disabilities)	

To: Secretary, FCC
For: Chief, Consumer and Governmental Affairs Bureau

REPLY COMMENTS OF HAMILTON RELAY, INC.

David A. O'Connor
Rachel S. Wolkowitz
Wilkinson Barker Knauer, LLP
1800 M Street NW, Suite 800N
Washington, DC 20036
Counsel for Hamilton Relay, Inc.

October 16, 2018

TABLE OF CONTENTS

SUMMARY	i
I. The Commission’s General Suspicions of Fraud, Waste, and Abuse in the IP CTS Industry Have Been Refuted	1
A. Statements from the OIG Refute the Commission’s Suppositions Refute the Commission’s Suppositions.....	1
B. Growth in the User Base Does Not Substantiate Claims of Misuse	3
II. The Record Overwhelmingly Supports a Rate Compensation Methodology that Fosters Both Competition and Quality, Unlike Cost-Based Rates	5
A. A Price Cap Methodology Would Provide a Reasonable Path Forward	5
B. A Cost-Based Model Is Inadequate and Would Ultimately Harm IP CTS Users	8
C. The Commission Must Avoid Arbitrarily Cutting Rates Without a Glide Path	10
D. Uniform Rates for CA-Assisted IP CTS Will Support the Commission’s Goals.....	11
E. A Reverse Auction Approach Is Premature and May Diminish Competition and Reduce Consumer Choice	13
F. It Is Premature to Adopt an ASR-Only IP CTS Rate.....	14
III. The Record Supports the Continued Use of Independent Assessments, and Self-Certification by Individuals Who Have Paid for the Service	14
IV. Conclusion	16

SUMMARY

The comments in this proceeding have refuted the general suspicions of fraud, waste, and abuse in IP CTS. More importantly, the Commission's Office of Inspector General determined earlier this year that there have been zero improper payments from the TRS Fund. The Commission must take these points into consideration, and approach IP CTS with a goal of ensuring functional equivalence, rather than trying to impose unnecessary and burdensome regulations on the industry. Hamilton encourages the Commission to work with hearing health professional organizations in an effort to improve the program for the patients that they serve.

To the extent that the Commission adopts a permanent IP CTS rate methodology other than MARS, Hamilton would not oppose a price cap methodology. A price cap could begin with a rational starting point, and have an annual adjustment factor that is predictable, rational, and sustainable for up to five years. Alternative rate proposals are unworkable or premature at this time. In addition, until the Commission adopts rules and standards to ensure that ASR-only users do not experience degraded quality, it would be premature to set an ASR-only rate methodology.

Finally, the record supports Hamilton's view that the continued use of independent assessments, state certified programs, Veterans Service Officers, and self-certification by individuals who have paid for the service remain the most effective means of ensuring that individuals who need IP CTS are able to register with the least burdens possible, while still maintaining the integrity of the TRS Fund.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals)	
with Hearing and Speech Disabilities)	

REPLY COMMENTS OF HAMILTON RELAY, INC.

Hamilton Relay, Inc. (“Hamilton”), by its counsel, submits these reply comments in response to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in the above-captioned proceeding regarding Internet Protocol Captioned Telephone Services (“IP CTS”).¹

I. The Commission’s General Suspicions of Fraud, Waste, and Abuse in the IP CTS Industry Have Been Refuted

A. Statements from the OIG Refute the Commission’s Suppositions Refute the Commission’s Suppositions

As Hamilton noted in its comments, this proceeding has not produced evidence of general fraud, waste or abuse in the IP CTS industry.² Those comments are echoed by other commenters in the record,³ but more importantly, they are bolstered by the Commission’s own internal investigative branch.

¹ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, CG Docket Nos. 13-24 & 03-123, FCC 18-79 (rel. June 8, 2018) (“*Report and Order*” or “*Further Notice*,” as appropriate).

² Hamilton Comments, at 16-18.

³ *See, e.g.*, Comments of Hearing Loss Association of America et al., CG Docket Nos. 13-24, 03-123 at iv (Sept. 17, 2018) (“Consumer Group Comments”) (“Though the Commission suspects this increased usage is a result of waste, fraud, and abuse, we see no evidence of such abuse of (continued)...

Specifically, in May 2018, the Commission’s Office of Inspector General (“OIG”) advised Commissioners about a risk assessment that the OIG performed on the TRS Fund and other funding programs. The OIG reported that the “FCC utilized an OMB-approved alternative sampling methodology to develop a statistically valid estimate of the improper payments for TRS. FCC’s improper payment estimate for TRS was zero.”⁴

Zero. The Commission’s own internal investigation, delivered to Commissioners *before* the June 8, 2018 decision, showed zero improper payments from the TRS Fund. And the numerous audits of Hamilton conducted by the TRS Fund Administrator corroborate a lack of fraud, waste or abuse in this service. Yet the Commission persists in referring to “Misuse” in the caption of this docketed proceeding, without producing evidence of such misuse other than isolated instances that could be resolved through existing enforcement procedures. The

the system, and no documents or enforcement proceedings by the Commission support this proposition. Given no evidence to the contrary, we believe the increased use is the result of an aging population that is becoming more generally aware of accessible technologies like IP CTS.”); Comments of American Speech-Language Hearing Association, CG Docket Nos. 13-24, 03-123 at 2 (Sept. 14, 2018) (“ASHA Comments”); (“ASHA is not aware of any circumstances where audiologists are receiving ‘kick-backs’ or incentives for certifying individuals for IP CTS or even more concerning, certifying individuals who do not need IP CTS. Such an arrangement would be a violation of several provisions of ASHA’s Code of Ethics”); Comments of International Hearing Society, CG Docket Nos. 13-24, 03-123 at 4 (Sept. 17, 2018) (“IHS Comments”) (“IHS is not aware of unethical practices or abuse within the process, and any instances of which the FCC is aware is undoubtedly the exception rather than the norm”); Comments of American Academy of Audiology, CG Docket Nos. 13-24, 03-123 at 4 (Sept. 7, 2018) (“AAA Comments”) (“We disagree with the FCC’s implication of business or marketing arrangements as evidence of pervasive bias in user assessments conducted by audiologists”); Comments of CaptionCall, LLC, CG Docket Nos. 13-24, 03-123 at 8-22 (Sept. 17, 2018) (“CaptionCall Comments”).

⁴ *FY17 FCC Compliance with the Improper Payments Elimination and Recovery Improvement Act (IPERIA or IPERA) Audit Report*, FCC Office of Inspector General Memorandum to Chairman Pai et al., Report No. 18-AUD-01-02, at 4 (footnote omitted, emphasis added) (May 18, 2018) (“OIG Report”). The OIG Report became publicly available on the OIG website on or about October 3, 2018. See <https://www.fcc.gov/inspector-general/reports/general/audit-inspection-and-evaluation-reports-issued-office-inspector#block-menu-block-4>.

continued references to fraud, waste, and abuse of IP CTS, in the absence of such evidence and in direct contrast to the statements and findings of the OIG, are a disservice to IP CTS consumers and providers alike.

Thus, while Hamilton shares the goals of the Commission and the TRS Fund Administrator to ensure that no fraud, waste or abuse occurs in the IP CTS industry, it opposes the supposition of fraud, waste, and abuse as an excuse to slash compensation rates and impose unnecessary and burdensome rules on the industry.

B. Growth in the User Base Does Not Substantiate Claims of Misuse

Hamilton agrees with other commenters that there is a substantial difference between the increased use of IP CTS by legitimate users, and the unsubstantiated misuse of IP CTS by ineligible users. As IHS notes, “[T]he increased use of IP CTS, however, does not necessarily mean there is widespread abuse within the system as suggested in the *FNPRM*; rather it is our members’ observation that more people in need are learning about and utilizing this life-changing service. This is a good thing.”⁵ ASHA concurs: “Although significant increases in utilization have occurred, ASHA notes that this growth is due in part to the increased incidence and prevalence of hearing loss and impairment, as well as the effects of fair and valid dissemination of information to individuals with a need for IP CTS.”⁶ ITTA, in contrast, merely offers misleading statistics about the growth of the TRS Fund.⁷

ASHA, AAA, and IHS have all offered to work with Commission staff to formulate a workable independent assessment program for measuring IP CTS user eligibility:

⁵ IHS Comments, at 1.

⁶ ASHA Comments, at 2; see also AAA Comments, at 1 (rebutting claim that growth in IP CTS usage has been exacerbated by the failure of user assessments to be sufficiently complete and objective”).

⁷ For example, ITTA’s claim that the fund has doubled in six years does not account for inflation or growth in the target demographic for IP CTS. ITTA Comments, at 4-5.

- ASHA has committed to “collaborating with the FCC to engage members in a campaign to drive best practices in the assessment and certification of IP CTS;”⁸
- AAA is “interested in working with the FCC to fully explain the role of the audiologist in the IP CTS certification process, as well as the professional and ethical obligations that are required by state licensure and a code of ethics prescribed by membership in a national organization.” AAA “strongly suggests deferring to the audiologist’s expertise in the considerations for IP CTS authorization and also recommends that all third-party professionals document the basis on which authorizations are made (e.g., severity of hearing loss, poor speech understanding with amplification, reduced cognitive capacity, and so on);”⁹
- IHS stands “ready to assist the FCC in its rulemaking with the ultimate goal of finding the right balance to ensure those in need of IP CTS regain and retain their full communicative ability and quality of life.”¹⁰

Hamilton encourages the Commission to accept the offer from these professional organizations to create a workable path forward for third party certifications, and Hamilton stands ready to assist in any implementation discussions.

Hamilton notes that AAA recently met again with Commission staff, during which AAA agreed to work with the Commission on educating hearing health professionals about IP CTS regulations, assessment practices, and guidelines for usage by patients. AAA also agreed that it can help educate patients to ensure proper usage.¹¹ These are encouraging interactions with Commission staff, and Hamilton hopes that there will be further discussions on these issues. Hamilton encourages the Commission to include providers, consumer groups, and other stakeholders in these discussions.

⁸ ASHA Comments, at 2.

⁹ AAA Comments, at 4.

¹⁰ IHS Comments, at 5.

¹¹ AAA *Ex Parte Letter*, CG Docket Nos. 03-123, 13-24 (filed Oct. 12, 2018).

II. The Record Overwhelmingly Supports a Rate Compensation Methodology that Fosters Both Competition and Quality, Unlike Cost-Based Rates

As noted in Hamilton’s initial comments in this proceeding, the Commission must ensure that any alternative rate methodology to the multistate average rate structure (“MARS”) that the agency adopts on a permanent basis sufficiently compensates IP CTS providers such that the market remains competitive and that service quality is assured.¹² When rates decline but costs do not (or do not in concert with rates), providers become unable to offer their services, leading providers to exit the market and leaving customers without service. Instead of adopting any mechanism that would promote market exit from IP CTS, the Commission should adopt permanent rates for CA-assisted IP CTS that would adequately compensate and incentivize providers to offer innovative and high quality services. With respect to ASR-only IP CTS, it is premature to set a rate until the Commission adopts a procedurally proper rulemaking on the delivery of ASR-only service under clearly delineated rules and service quality standards.

A. A Price Cap Methodology Would Provide a Reasonable Path Forward

As an initial matter, Hamilton agrees with Sprint that MARS “remains the most appropriate rate-setting methodology for competitive carriers.”¹³ As CaptionCall observed, “To best achieve [the agency’s] goals, the Commission should adopt an IP CTS rate methodology

¹² Hamilton Comments at 2; *see also* ClearCaptions Comments at 20 (“the Commission should undertake rate setting designed to permit and foster competition”).

¹³ Sprint Comments at 8; *see also* Comments of Hamilton Relay, Inc., CG Docket Nos. 10-51, 03-123, at 2-3, 5-8 (filed May 24, 2017); Comments of Sprint, CG Docket Nos. 10-51, 03-123, at 2 (filed May 29, 2018); Comments of Sprint, CG Docket Nos. 10-51, 03-123, at 2-3 (filed May 24, 2017); Comments of Hamilton Relay, Inc., CG Docket Nos. 10-51, 03-123, at 5-6 (filed May 24, 2016); Comments of Sorenson Communications, CG Docket Nos. 10-51, 03-123, at 3 (filed May 24, 2016); Reply Comments of Ultratec, CG Docket Nos. 10-51, 03-123, at 2-4 (filed June 11, 2015); Comments of Hamilton Relay, Inc., CG Docket Nos. 10-51, 03-123, at 4-8 (filed June 4, 2015).

that is designed to approximate market-based rates.”¹⁴ MARS is the only relay rate methodology ever adopted by the Commission that actually approximated market-based rates. To the extent the Commission determines it must change rate methodologies, the Commission should adopt a price cap rate methodology as the alternative that is most likely to reflect market-based rates, provided that a reasonable X-factor is employed.¹⁵ Both the Commission’s proposed “cost-based” model and the ClearCaptions tier-rated plan are inappropriate rate methodologies for IP CTS, while the reverse auction plan proposed by CaptionCall is premature and may lead to diminished competition and fewer choices for consumers.

Specifically, the starting point for any price cap rate should be no lower than \$1.7630.¹⁶ As noted in Hamilton’s comments, this rate represents the IP CTS rate adopted by the Commission for the 2011-2012 funding year, and the last year in which neither the Commission nor any party to the proceeding challenged the MARS CTS/IP CTS rate as unreasonable.¹⁷

An X-factor adjustment is a component feature of price cap methodologies, and is intended to reflect future efficiency gains and related cost savings in an industry.¹⁸ As previously demonstrated through analyses by The Brattle Group and Consortia, an X-factor based primarily on efficiency gains in labor costs would be close to zero.¹⁹ Nevertheless, one possible method of calculating an X-factor for CA-assisted calls would be to examine past cost efficiencies that have been realized in providing IP CTS services and project them forward.

¹⁴ CaptionCall Comments, at 59.

¹⁵ *Id.* at 61-64.

¹⁶ *See* Hamilton Comments, at 5.

¹⁷ *Id.* at 4.

¹⁸ Coleman Bazelon, Patrick Holder, & Brent Lutes, *Economic Analysis of IP CTS Provision Costs and Rate Setting*, The Brattle Group, at 5 (Nov. 8, 2017) (“Bazelon Price Cap Analysis”) attached to *Ex Parte* Letter from David A. O’Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24 & 03-123 (filed Nov. 9, 2017).

¹⁹ *Id.* at 7.

These historical costs can be used as a rough proxy for historical efficiency gains in the IP CTS market.

Even so, due to several factors, recent cost trends will likely be a better predictor of future efficiency gains than older cost trends might be. First, the rate of efficiency gain in an industry often diminishes over time; therefore, predicting future efficiency gains based on efficiency gains that are distant in time may result in an overestimate. Second, a number of issues may mask the level of true efficiency gains in the earlier years of IP CTS cost data collection, which began in 2013. For example, when cost reporting started, there was little guidance with respect to what providers should report as allowable costs.²⁰ This uncertainty likely led to changes in cost reporting practices over the first few years, resulting in a decrease in *reported* costs, which were unrelated to changes in *actual* costs. Similarly, reductions in actual costs stemming from regulatory decisions are also unrelated to efficiency gains. For example, in 2013, the Commission prohibited user incentive programs, which reduced some providers' expenditures related to such programs.²¹ The Commission also prohibited the sale of user IP CTS devices for less than \$75, which reduced some providers' subsidization costs.²²

Ultimately, although there may have been IP CTS efficiency gains in earlier years, those gains are likely smaller than is suggested by the decline in costs over that period. Moreover, it is likely that the rate of efficiency gain has diminished over time, as is often the case in maturing

²⁰ See, e.g., Comments of Hamilton Relay, CG Docket Nos. 13-24, 03-123, at 2-4 (Feb. 26, 2013) (seeking similar clarification, with additional specific questions regarding wholesale and retail arrangements); Comments of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 13-24, 03-123 at iii, 12-16 (filed Feb. 26, 2013) (seeking clarification on language the Commission's interim order barring "any form of direct or indirect inducements . . . to subscribe to or use or encourage subscription to or use of IP CTS").

²¹ *Report and Order*, ¶¶ 5-6.

²² *Id.*

industries. Therefore, the Commission should weigh recent and predicted future changes in costs more heavily when calculating an X-factor. Indeed, one can reasonably expect efficiency gains with respect to CA-assisted calls to maintain the same trend in the near future as they have recently exhibited.²³ Given such an expectation, a reasonable X-factor would be one based on reported costs in 2016 through 2017 and expected costs for 2018 and 2019. This produces an X-factor of 1.1 percent.²⁴

Using the data above, and the average annual inflation for 2017-2018, and a starting point of \$1.7630, as an example, the new rate would be \$1.7866.²⁵ Each year, the X-factor will be subtracted from the then current GDPPI, establishing a new IP CTS rate for each year. Once finalized, the same X-factor may be able to be used for 3 to 5 years. After this initial period, a new X-factor would need to be established. A similar cost analysis could be completed at that time, using then-current actual cost data and comparing to actual cost data at the time the X-factor was established.

B. A Cost-Based Model Is Inadequate and Would Ultimately Harm IP CTS Users

Commenters agree that the Commission's proposed cost-based model disregards legitimate provider costs, and that significant harm could follow from such a decision.²⁶ As Hamilton noted in its comments, the Commission must at least follow the allowable cost pattern in Part 32 of the Commission's rules.²⁷ Sprint correctly observes that "the Commission

²³ This approach is more scientifically grounded than simply assuming efficiency gains are equal to inflation. *See* CaptionCall Comments, at 60.

²⁴ This X-factor of 1.1 percent may need to be recalculated once providers report all actual costs, and the TRS Fund Administrator discontinues its practice of removing any of those costs.

²⁵ The average annual inflation for 2017-2018, measured as an April-to-April change in Gross Domestic Product Price Index ("GDPPI"), is 2.44 percent. Taking 2.44 percent and subtracting the X-factor of 1.1 percent equals 1.34 percent. Multiplying 1.0134 by \$1.7630 equals \$1.7866.

²⁶ *See, e.g.*, Sprint Comments at 11-15; ClearCaptions Comments, at 5-10.

²⁷ Hamilton Comments, at 13-15.

ignore[d] the concomitant costs associated with setting a rate that effectively forces providers out of the marketplace.”²⁸ That is, “certain TRS costs as currently reported in the [Fund Administrator’s] annual cost report need rethinking.”²⁹ Indeed, InnoCaptions warned that “the continued use of weighted average provider costs to establish rates will endanger [InnoCaptions’] viability as well as the viability of other small and emerging IP-CTS providers who may enter the marketplace.”³⁰ Accordingly, the Commission should not adopt its proposal or other similar cost-based models that will fail to adequately compensate IP CTS providers and lead to market exit.

As Hamilton and others have argued, if the Commission does adopt a cost-based rate methodology, that methodology must include and account for all actual costs.³¹ For example, among other things, the Commission should reimburse providers for reasonable marketing expenses.³² Eliminating reimbursement costs for marketing likely would have the perverse effect of reducing competition and distorting the market such that the low-cost and largest provider would capture most or all of the market. This is because the low-cost and largest provider would be better situated to absorb marketing expenses, while other providers would be forced to cut down on marketing. This relative change in marketing efforts would allow the low-cost provider to perpetually gain market share.

²⁸ Sprint Comments, at 14.

²⁹ ClearCaptions Comments at 5.

³⁰ InnoCaptions Comments at 3.

³¹ See Hamilton Comments at 13-15; ClearCaptions Comments at 5; Sprint Comments at 18-20.

³² See Comments of ITTA – The Voice of America’s Broadband Providers, CG Docket Nos. 13-24, 03-123, at 12 (filed Sept. 17, 2019) (“ITTA Comments”). ITTA suggests that the Commission should eliminate outreach and marketing expense recovery. *Id.* at 15. However, such expenses are recognized under Part 32 accounting rules. 47 C.F.R. § 32.6613

C. The Commission Must Avoid Arbitrarily Cutting Rates Without a Glide Path

Those arguing for an additional drastic reduction or a reduction without a sufficient glide path ignore important economic realities, and the Commission should ignore such economics-free rate-setting.³³ For example, ITTA is incorrect that a 10 percent reduction in the IP CTS reimbursement rate is justified by a precedent in the Video Relay Service (“VRS”) market.³⁴ Rather, the fact that VRS providers survived “successive 10 percent annual reductions” in reimbursement rates does not imply that IP CTS providers would be able to absorb the same reduction.³⁵ VRS and IP CTS are different services with different cost structures, different competitive landscapes, and different operating margins. Moreover, unlike IP CTS, VRS service was initiated with reimbursement rates that neither resembled nor were based on the reimbursement rates of other TRS services, meaning that VRS rates were likely in need of and better able to sustain a rate recalibration.³⁶ Even if IP CTS providers were realizing “excessive” profits (a theory not borne out in the record), these hypothetical excess profits cannot be proxied by any excess profits that were perceived to exist in the VRS market. Moreover, the 10 percent decrease in VRS rates was arbitrary by its nature and has led to uncertainty and instability in the VRS industry, with one dominant provider. The fact that an arbitrary rate reduction in VRS has not yet led to the destruction of the market is not a valid reason to believe that the same arbitrary reduction applied to a different market will have the same result.

Further, any rate deductions must be done in such a way that allows providers to change their business plans and investments in response. For example, ITTA claims that providers’ past

³³ *Id.* at 8-12.

³⁴ *Id.* at 8-9.

³⁵ *Id.* at 9.

³⁶ *See, e.g.*, United States Government Accountability Office (GAO), GAO-15-409 at 54 (April 2015) <http://gao.gov/assets/670/669916.pdf> (showing TRS rates over time).

profits, despite being inaccurately measured by the Fund Administrator, would allow providers to absorb future drastic reductions in reimbursement rates. However, such a claim relies on the incorrect assumption that providers have retained past earnings in a liquid state rather than, for example, sinking earnings into research and development, or distributing returns to equity or debt holders. Nevertheless, past earnings are not the only factor contributing to future solvency. Even if providers could have prepared for a different future reimbursement regime, the simple fact that the alternative regime was not known requires that any reforms be sustainable to firms starting with the positions they are in today.³⁷

D. Uniform Rates for CA-Assisted IP CTS Will Support the Commission's Goals

The Commission should adopt a unitary rate for all CA-assisted IP CTS minutes. As a practical matter, “a single rate reduces the complexity and administrative burden of adopting either different rates for each provider or tiered rates.”³⁸ Further, tiered rates “fail[] to replicate the conditions that would exist in a competitive market.”³⁹ As explained by Drs. Bazelon, Holder, and Lutes:

[I]mplementing a tiered rate system in conjunction with a price cap (or in conjunction with any of the rate structures currently under consideration) would be inappropriate. The intention of a tiered rate is to subsidize small-scale, high-cost providers so that they may grow and eventually compete with larger providers. Competition is essential for a healthy market and should be encouraged by regulators in order to stimulate innovation and drive

³⁷ ITTA Comments, at 12 (arguing that no glide path is necessary because providers have realized high margins in the past, and therefore are unlikely to go out of business as a result of a sudden and drastic reduction in rates). ITTA also errs in suggesting that the Commission should consider a budget cap for the TRS Fund. ITTA Comments, at 20-21. The Americans with Disabilities Act, under which the Commission is required to carry out its mandate of ensuring functionally equivalent communications, does not envision or tolerate a budget cap on meeting the needs of individuals who are deaf, hard of hearing or DeafBlind.

³⁸ CaptionCall Comments at 78.

³⁹ *Id.* at 79.

costs down. However, a tiered rate system is an inefficient and likely ineffective way to encourage competition.⁴⁰

In addition, to the extent some argue for “an emerging provider rate,”⁴¹ “[s]mall providers can be supported through capital markets if prospective investors in those small providers can eventually realize reasonable and stable returns.”⁴²

A tiered rate system is an inefficient and likely ineffective way to encourage competition. There are two reasons for this. First, the cost efficiencies that come with scale are complex, which makes it difficult from an external regulatory perspective to choose an appropriate point of transition between tiers. If the chosen transition point does not properly reflect the complex economies of scale for each provider, the system will either fail to spur competition or wastefully over-subsidize providers. Adding to this challenge is the fact that the markets may fluctuate over time and change the relationship between scale and costs.

The second reason that a tiered system would be inefficient is that even if the tiers properly reflect the complex economies of scale, the system would subsidize inefficient providers without discerning their ability to eventually become efficient. That is, poorly-operated providers that would have been forced out of an efficient market would be allowed to remain in the market and perpetually receive subsidies to do so. In effect, a tiered system circumvents the market forces that would otherwise drive provider efficiency.

A tiered rate structure would also disincentivize providers from cutting costs. With a single rate, providers at least have some incentives to lower costs relative to other providers (even though the incentives are much weaker than they would be in a market-based system).

⁴⁰ Bazelon Price Cap Analysis at 11.

⁴¹ See InnoCaptions Comments at 4.

⁴² Bazelon Price Cap Analysis at 12.

Lowering costs in a single rate cost-based system has two countervailing effects. First, it will obviously lower the costs paid by a provider, which increases that provider's potential margin.

Second, it will decrease average costs (averaged over all providers), which will reduce the reimbursement rate; the reduced reimbursement rate will of course reduce that provider's potential margin. So long as the first effect is sufficiently larger than the second effect, providers may still engage in some cost savings activities. In contrast, a tiered rate structure will cause the two effects to more closely offset each other. A tiered structure strengthens the link between a provider's costs and the reimbursement rate for that provider, which weakens the incentive to seek additional margin through cost saving activities.

In sum, because a price cap plan more accurately approximates market forces, it should be the preferred rate methodology over a tiered rate structure.

E. A Reverse Auction Approach Is Premature and May Diminish Competition and Reduce Consumer Choice

CaptionCall has proposed a reverse auction in order to establish an IP CTS rate methodology, following an initial period of a price cap approach, as an alternative to re-setting the X-factor.⁴³ While there may be merits to such an approach, Hamilton believes that it would be premature and unwise to adopt a methodology that may limit the number of providers that can acquire new users, which may ultimately lead to less choice for consumers of IP CTS. In addition, a reverse auction will inevitably produce winners and losers, and could have the effect of reducing competition by forcing one or more providers out of the business. A reverse auction will also likely lead to greater market concentration in the top one or two providers, thus leading towards a marketplace with one or perhaps two dominant providers rather than the more robust competition that exists among providers today. As the Commission has noted, there is a public

⁴³ CaptionCall Comments, at 72-77 & App. D.

benefit to having competition in relay services, as competition plays a role in ensuring that relay services are being offered in the most efficient manner.⁴⁴ For these reasons, Hamilton believes that a price cap approach would be preferable to a reverse auction.

F. It Is Premature to Adopt an ASR-Only IP CTS Rate

Hamilton does not object to ASR-only IP CTS, provided that the Commission uses procedurally proper methods to authorize ASR, and provided ASR-only is authorized only if it delivers a functionally equivalent experience for IP CTS users, proven through clear rules and measurable quality and performance standards. However, until such rules and standards are in place to ensure that ASR-only users do not experience degraded quality, it would be premature to set an ASR-only rate methodology.⁴⁵ Once such rules and standards have been adopted, the Commission can adequately measure the true cost of providing ASR-only service, thus ensuring that any rate methodology adopted adequately compensates providers for the “reasonable costs of providing interstate TRS.”⁴⁶

III. The Record Supports the Continued Use of Independent Assessments, and Self-Certification by Individuals Who Have Paid for the Service

Hamilton continues to support the position of Consumer Groups that users should be given the option of paying \$75 or more for the IP CTS phone and self-certifying without the need for a third party certification.⁴⁷ As the Consumer Groups note, “Allowing individuals to

⁴⁴ *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order, 32 FCC Rcd 5891, 5907 ¶ 31 (2017) (noting the competition is likely to “encourage the lowest-cost provider to maintain higher standards of service quality than if it faced no competition”) (“2017 VRS Order”), *aff’d Sorenson Communications v. FCC*, 897 F.3d 214 (D.C. Cir. 2018).

⁴⁵ See ClearCaptions Comments, at 21-23 (noting that it is premature to set a rate for ASR IP CTS).

⁴⁶ 47 C.F.R. § 64.604(c)(5)(iii)(E)(1).

⁴⁷ Consumer Group Comments, at 11-12.

personally attest to their need for IP CTS is not only the least burdensome option for consumers, but it is also the most fiscally prudent for the TRS Fund.”⁴⁸

In addition, as Hamilton noted in its initial comments, the Commission has proposed a workable revision of the existing IP CTS rules in Appendix C of the *FNPRM*, subject to certain revisions set forth in Hamilton’s comments.⁴⁹ These proposed rules would allow independent third party certifications to continue, with necessary and appropriate safeguards to ensure that the certifying practitioner is independent, qualified, and has determined that IP CTS is appropriate for the registering individual.

As part of this independent assessment program, Hamilton believes it is particularly important to ensure access to IP CTS by veterans of the Armed Forces, who tend to suffer disproportionately from hearing loss. Veterans Service Officers should be permitted to certify veterans who are enrolled in the Veterans Administration healthcare system.⁵⁰

Hamilton believes that state TRS programs and Equipment Distribution Programs (“EDPs”) approved by the Commission should be permitted to continue certifying individuals along with other outlets for independent assessments. Under this approach, if a particular state does not have an EDP program, it would not be required to establish one. But current EDP programs can and should be utilized, and the Commission should draw on their well-qualified expertise. They should not, however, be the *only* method of approving eligible users.

Hamilton believes that the Commission can oversee an effective and fiscally responsible self-certification/third party certification system for IP CTS that is sustainable for the long-term and is not burdensome for the consumers who need the service. This approach, combined with

⁴⁸ *Id.* at 11.

⁴⁹ Hamilton Comments, at 21-22.

⁵⁰ *Id.* at 20.

effective enforcement under the rules that the FCC has already adopted,⁵¹ including those that have not yet even gone into effect, will ensure the sustainability of the IP CTS program.

IV. Conclusion

Hamilton urges the Commission to tread carefully in this proceeding, to ensure that the careful balance of protecting consumers and fostering competition in the relay marketplace is not upset by the introduction of unnecessary regulations, harmful rates that spur market exit, and burdensome consumer obligations that prevent legitimate users from accessing the service. Hamilton encourages the Commission to continue its efforts to engage with hearing health professionals, consumer groups, providers, and other stakeholders in order to ensure that any rules that are adopted in this proceeding, and that are proposed in the companion *NOI* proceeding, are truly necessary and designed to maintain that careful balance.

Respectfully submitted,

HAMILTON RELAY, INC.

/s/ David A. O'Connor

David A. O'Connor

Rachel S. Wolkowitz

Wilkinson Barker Knauer, LLP

1800 M Street NW, Suite 800N

Washington, DC 20036

Tel: 202.783.4141

Its Counsel

October 16, 2018

⁵¹ See, e.g., Sprint Comments, at 20.